No. 75-182

Supreme Court, U. S.
FILED
NOV 10 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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1. The issue which the Equal Employment Opportunity Commission has presented to this Court for review arises from the ruling of the court below that layoffs pursuant to a company-wide seniority system

which eliminate a vastly greater proportion of minority than other employees would not constitute a violation of Title VII even if it were shown that the disproportionate impact is the result of the employer's post-1965 discriminatory hiring practices. Respondent employer and the respondent union, whose collective bargaining agreements provide for layoff by company seniority, contend that the issue posed by the Commission is not presented in this case because there is not, in the record presently before this Court, any finding that the company did in fact engage in post-1965 discriminatory hiring practices. The point that we make in the petition, however, and the reason the issue is presented to this Court at this time is that the opinion of the Court of Appeals has precluded the Commission from developing the facts to show post-1965 discriminatory hiring practices. The majority of the Court of Appeals has held that proof "that past discrimination occurred and that the effects of such past discrimination are perpetuated by the present layoff practices under the current plant-wide seniority system" are "without probative value in challenging a bona fide seniority system" (Pet. App. 54). In so holding, the majority below drew no distinction between pre-1965 discrimination, which was not then regarded as unlawful, and post-1965 discrimination in hiring practices, which was manifestly unlawful under Title VII. It is precisely because the opinion of the court below holds immaterial

proof of post-act hiring discrimination that the issue should be reviewed now.[1]

2. Respondent employer also contends that the Equal Employment Opportunity Commission is estopped from asserting that the seniority system is not bona fide because it entered into a conciliation agreement with respondents which, the company now claims, incorporated the seniority system without change. The company obviously did not deem that the conciliation agreement had so clearly incorporated the seniority system when it took the initiative of instituting this action to resolve what it deemed to be possible conflicting claims under the conciliation agreement and the collective bargaining agreements. Nor did the Court of Appeals hold that the conciliation agreement incorporated the collective bargaining agreement in toto. The basic decision of the Court of Appeals was that "the two agreements are not in conflict either by their express terms or by implication" (Pet. App. 48). In support of this conclusion the Court of Appeals did point to certain provisions of the conciliation agreement which made reference to the collective bargaining agreement (Pet. App. 45). Paragraph 10 of Section III quoted in the opinion (Pet. App. 45) must be read in the context of the section where it appears. Paragraph 9 of Section

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[1] As we point out in our petition for a writ of certiorari (Pet. 9), there is, even in the present record, substantial statistical evidence to indicate that the Commission, if permitted to develop the facts, could show post-1965 discriminatory hiring practices.

III (quoted at Pet. App. 43) provides that respondent shall make a reasonable effort to recruit minorities and females into those "craft areas where such jobs are to be filled by new hires." Paragraph 10 then provides that persons hired into craft jobs after the effective date of the conciliation agreement are to be given credit for service elsewhere but that "[t]he wages, benefits, other conditions of employment and seniority date of *such* employee shall be determined in accordance with the provisions of the collective bargaining agreement." [Emphasis supplied]. And in ¶ 2 of Section IV, where the parties agree to give "affected class" members opportunities to transfer and to be promoted subject to vacancies being available, those transfers are to be made "in a manner consistent with the current Collective Bargaining Agreement." These references to the collective bargaining agreement are limited to certain select groups under special circumstances; they scarcely have the blanket effect which the respondent now imputes to them.

Aside from these limited references to the collective bargaining agreements with respect to craft positions and transfers, it is evident, particularly with respect to the affirmative action program, that the question of a general layoff was simply not within the contemplation of the conciliation agreement. The whole agreement proceeds on the assumption that the company would continue to have vacancies and would be engaged in new hires. As the Court of Appeals noted (ft. 39, Pet. App. 43), the district

court concluded that the specific contingency of layoffs by seniority was not dealt with in the formulation of the conciliation agreement. And the Court of Appeals itself noted, as "highly significant," that "the conciliation agreement contains no overall layoff procedure or seniority system." (Pet. App. 43).

The question whether the layoffs by this company in the context of its post-1965 hiring practices violates Title VII is thus a matter which was not within the scope of the conciliation agreement. Rather it is a new matter or practice which, under the express terms of the conciliation agreement (see Pet. App. 28-29), is not covered by the waiver of the right to sue incorporated in that agreement. Whether or not the layoffs violate Title VII, under the standard which we, in our petition for a writ of certiorari, have asked the court to adopt as proper, is of course a matter to be determined on the facts to be more fully developed before the district court without reliance on the conciliation agreement. The issue is here now because the respondent instituted the suit and made the Commission a party defendant. The proper standard by which that issue must be judged should be determined now because the Court of Appeals, in our view, has set forth an improper standard which will preclude the Commission from developing the relevant facts, not only in this suit, but in any future suit which it may be in a position to bring on behalf of the persons aggrieved by the layoffs. Since, as we discuss in the petition for a writ of certiorari, the issue is one of great significance, not only in this

case but in others, and since that issue is properly before this Court at this time as the result of the company's action in instituting suit for a declaratory judgment, we respectfully urge that our petition for a writ of certiorari be granted.

Respectfully submitted,

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November 7, 1975

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief for the Equal Employment Opportunity Commission were today mailed, postage prepaid, to the following counsel of record:

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